Supreme Court, U. S.
FILED
SEP 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-461

ELIZABETH ANN NORTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN D. GRAD
HIRSCHKOP & GRAD, P.C.
108 North Columbus Street
Post Office Box 1226
Alexandria, Virginia 22313
(703) 836-6595

ARTHUR H. BLITZ
8700 Georgia Avenue
Silver Spring, Maryland 20910
(301) 588-8750

ROBERT D. SALZER
8700 Georgia Avenue
Silver Spring, Maryland 20910
(301) 589-2442

Counsel for Petitioner.

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT

This Case Presents A Case of Extreme Importance Under 2680(h) of The Federal Torts Claim Act With Major Impact Upon The Rights of Innocent Victims of Illegal Federal Law Enforcement Behavior To Recover Damages Under The Torts Claim Act As Amended in 1974 5

CONCLUSION 11

APPENDIX:

– United States Code, Title 28, 1346(b). 1a

– United States Code, Title 28, 2674 . . . . . 1a

– United States Code, Title 28, 2680(h). 2a

– Order of the United States District Court Denying Defendants' Motion for Summary Judgment and Granting Plaintiff's Motion for Summary Judgment on the Issue of Liability 3a

– Order of the United States Court of Appeals Reversing and Remanding Order of the United States District Court. 31a

– Order of the United States Court of Appeals Denying Petition for Rehearing and/or Suggestion for Rehearing *En Banc* 49a

TABLE OF AUTHORITIES

Cases:

Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) 7, 9

Butz v. Economou, ___U.S.___, 46 U.S.L.W. 4952 (June 29, 1978). 10

Page

Constitution:

Fourth Amendment to the United States Constitution ..... *passim*

Statutory Provisions:

21 U.S.C. §79 6

28 U.S.C. §1254(1) 2, 4

28 U.S.C. §1346(b) 4, 5

28 U.S.C. §2674 2

28 U.S.C. §2680(h) ..... *passim*

Other:

Pub. L. 93-253, §2, 88 Stat. 50 (March 16, 1974) 5

119 Cong. Rec. 23246 (1973) 6

Senate Committee on Government Operations, Memorandum on No-Knock Legislation, August 28, 1973 ..... 7, 8, 9

S. Rep. No. 93-469, 93d Cong., 1st Sess. (1973) ..... *passim*

S. Rep. No. 93-588, 93d Cong., 1st Sess. (1973) ..... *passim*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. _____

ELIZABETH ANN NORTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Elizabeth Ann Norton respectfully requests that a Writ of Certiorari issue to review the judgment of a divided panel of the United States Court of Appeals entered on July 19, 1978, which reversed the opinion of the District Court below and remanded to the District Court for further proceedings.

OPINIONS BELOW

The opinion of the District Court is printed at 427 F. Supp. 138. The opinion of the United States Court of Appeals is not yet published. Copies of both opinions are attached, App. at 3a and 31a, respectively.

JURISDICTION

Petitioner seeks review of a decision of the United States Court of Appeals for the Fourth Circuit dated July 19, 1978, rehearing denied August 18, 1978, reversing a judgment of the District Court in petitioner's favor, entered March 25, 1977. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether in a suit under the Federal Torts Claim Act and 28 U.S.C.§ 2680(h) therein for constitutional and state law torts committed by federal law enforcement agents the United States can raise as its defense the good faith and reasonable belief of its employees in the legality of their conduct.

STATUTORY PROVISIONS

The following statutory provisions are in issue and are set forth verbatim in the Appendix:

28 U.S.C. § 2674
28 U.S.C. § 2680(h)
28 U.S.C. § 1346(b)

STATEMENT OF THE CASE

On the evening of March 15, 1975, the Alexandria, Virginia Police Department received an anonymous phone call regarding the purported whereabouts of Patricia Campbell Hearst, then a nationally sought fugitive. The caller, now believed to have been a disgruntled neighbor of plaintiff, stated that Ms. Hearst was occupying Apartment 10 at 649 Notabene Drive in Alexandria. This information was immediately relayed to the Alexandria branch office of the Federal Bureau of Investigation. Agent Robert J. O'Brien was contacted and placed in charge of the investigation. Agent O'Brien was the coordinator of the Alexandria Division of the nationwide search for Ms. Hearst and other allegedly connected fugitives. He and three other agents proceeded to the Alexandria Police Department.

A check of the locater crisscross indices published by the telephone company indicated that the apartment was occupied by one Victor Henry Evol, although that crisscross index was outdated by several months. Ms. Norton, the plaintiff below, had leased the apartment on November 1, 1974. After checking the index, without any further investigation and without obtaining a warrant from a magistrate on duty at the police station, the four F.B.I. agents departed for a site near 649 Notabene Drive, where they were met by two Alexandria police officers at approximately 9:30 P.M. The F.B.I. agents were armed with individual revolvers and two shotguns, plus tear gas equipment. None of the men was in uniform.

After a brief survey of the immediate area, it was decided to resolve the question of Patricia Hearst's presence in the plaintiff's apartment itself. Four of the men approached the apartment in which a light was on and a stereo was being played. One of the agents knocked on the door. In response the plaintiff, alone in her apartment, asked "Who is it?" After being advised that it was the F.B.I., plaintiff requested identification. Agent O'Brien told plaintiff to open the door to view their credentials, but she again refused to open the door without first being satisfied that the people at the door were in fact F.B.I. agents. Following this refusal, four men attempted to forcibly open the door to Apartment 10 by striking it quite forcibly. Plaintiff finally opened the door. Agents entered and searched the apartment with their weapons drawn. Plaintiff was guarded and detained during the entire ordeal. While the agents now concede

that she was visibly shaken, psychiatric evidence at the damages hearing indicated that plaintiff in fact suffered severe psychological damages from the trauma.

The Petitioner instituted this suit in the United States District Court for the Eastern District of Virginia, Alexandria Division, on January 5, 1976, against the four F.B.I. agents, the two Alexandria police officers and the United States, seeking monetary and declaratory relief for the wrongful invasion of her Fourth Amendment rights as well as for the common law torts of assault, trespass and false imprisonment. The United States was sued under the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2674 and 2680(h).[1] On cross-motions for Summary Judgment on the question of the liability of the United States for the intrusion, the District Court, on January 26, 1977, denied the defendants' motion and granted the plaintiff's motion. App. at 3a.

The Court concluded that at the moment of entry, the facts and circumstances within the defendants' knowledge and of which they had reasonably trustworthy information were not sufficient to warrant a prudent man to believe that Ms. Hearst was inside the apartment. The District Court also concluded that the illegal entry resulted in the establishment of a prima facie case of assault, trespass and false imprisonment under Virginia law.

Finally, the Court ruled that while the individual defendants would not be subjected to monetary liability for either constitutional or common law torts, if they acted under a reasonable good faith belief in the legality of their actions, the United States could not, as a matter of

[1] The individual F.B.I. agents and police officers were nonsuited by plaintiff following the granting of Summary Judgment in her favor.

law, assert this immunity. Having found tortious behavior, the District Court held the United States liable. The United States appealed this, and only this, portion of the District Court's ruling.[2] Its appeal was sustained on July 19, 1978 by the United States Court of Appeals for the Fourth Circuit by a 2 to 1 decision. Petitioner moved in the Court of Appeals for a rehearing and/or suggestion for hearing *en banc*. The petition for rehearing was denied by a 2 to 1 decision, copy attached, App. at 49a.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS A CASE OF EXTREME IMPORTANCE UNDER 2680(h) OF THE FEDERAL TORTS CLAIM ACT WITH MAJOR IMPACT UPON THE RIGHTS OF INNOCENT VICTIMS OF ILLEGAL FEDERAL LAW ENFORCEMENT BEHAVIOR TO RECOVER DAMAGES UNDER THE TORTS CLAIM ACT AS AMENDED IN 1974.

In 1974, the Congress amended the Federal Tort Claims Act so that 28 U.S.C. §2680(h) now reads:[3]

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: provided, that with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment

[2] The United States appealed neither the finding of a constitutional violation nor the District Court's award upon trial of damages of $12,500.

[3] Pub. L. 93-253, §2, 88 Stat. 50 (March 16, 1974).

of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

The impetus for the 1974 amendment to the FTCA was a series of highly publicized narcotic raids, illegally conducted, which took place in Collinsville, Illinois, in the spring of 1973.[4] Senator Charles Percy (Ill.), the amendment's principle author,[5] was outraged. His anger did not simply focus, however, on the fact that these raids occurred within his home state. He strongly felt that these raids were the result of the liberal no-knock law, 21 U.S.C. § 79; that the overzealous conduct of federal law enforcement agents in these raids violated the victim's Fourth Amendment rights and finally that the Federal Tort Claims Act should be altered so that "in the future individual citizens be permitted to bring actions directly against the Federal Government to recover for the *damage* they sustained due to the intentional and willful misdeeds of Federal officers." Sen. Rep. No. 93-469, *supra*, at 29-33 (emphasis added).

---

[4] In April of 1973 federal agents conducted narcotics raids on the homes of two innocent families. See, S. Rep. No. 93-469, 93d Cong., 1st Sess., 21-29, 29-35 (individual views of Senator Percy) (1973). The forcible entries were accompanied by outrageous conduct of the federal agents which included threats of bodily harm, physical restraint of two unarmed people, brandishment of weapons and failure to identify themselves as federal agents. See, 119 Cong. Rec. 23246 (1973), quoting the St. Louis Dispatch, April 29, 1973, at 1A, Col. 1.

[5] S. Rep. No. 93-588, 93d Cong., 1st Sess. (1973).

Senator Percy was most acutely concerned with creating a right of individuals for recompense for the damage they sustained during illegal search and seizures, regardless of the "good faith" of government agents.[6] Noting that this Court in *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), held that the violation of the Fourth Amendment command against unreasonable searches and seizures gave rise to a federal cause of action for damages against the offending agent, Senator Percy further noted that

> [W]hile this [an action against the individual agent] gives victims of abusive tactics some opportunity for relief, their remedy is severely limited by the ease with which the agents can usually establish the defense of having acted in good faith and with probable cause . . . it seems to me that it is now time to amend the Federal Tort Claims Act so that victims of deliberate violence and terrorism at the hands of Federal agents can be better compensated, if only monetarily, for their losses. S. Rep. No. 93-469, *supra*, at 36.

Senator Percy accordingly introduced as an amendment to a pending bill the legislation which presently is § 2680(h) of Title 28. The Senate Committee on Government Operations accepted the amendment as proposed, and in the accompanying report, stated:

> [T]he effect of this provision is to deprive the Federal Government of the defense of sovereign immunity in cases in which Federal law enforcement

---

[6] "One of the most shocking aspects of drug raids on innocent victims is the absence of an effective legal remedy against the Federal government for the damages done to their homes, harm done to their persons, or for the pain, suffering and humiliation they were forced to undergo." S. Rep. No. 93-469, 93d Cong., 1st Sess. (1973).

> agents, acting within the scope of Federal law, commit *any* of the following torts . . . the Committee amendment would submit the Government to liability *whenever* its agents act under color of law so as to injure the public search and seizures that are conducted without warrants or with warrants issued without probable cause. S. Rep. No. 93-588, *supra* (emphasis supplied).

Shortly before writing the Senate report, the Senate Committee on Government Operations prepared a memo which further underscores the Committee's intent to do away with the good faith defense to the United States liability:

> It is not the intention of this amendment to allow any other defenses [besides those in section 2680 (h)] that may be available to individual defendants by state or federal law, custom, or practice to be asserted [by] the government. Congress does not oppose, however, the assertion of defenses of good faith and reasonable belief in the validity of the search and arrest on behalf of individual government defendants, so long as it is understood that the government's liability is not co-terminous with that of the individual defendants.[7]

The emphasis was thus on providing a remedy both for victims of negligence and intentional torts by the actions of federal agents. Just as the "good faith" of a negligent mail truck driver was irrelevant to the government's liability in a pre-1974 Federal Torts Claim Act suit, so should the "good faith" of a federal law enforcement agent be irrelevant when he commits a tort that abuses the powers granted him and through tortious conduct causes injury to innocent victims.

---

[7]Senate Committee on Government Operations, Memorandum on No-Knock Legislation, August 28, 1973, at 5.

In the United States Court of Appeals the government suggested a contrary interpretation of the legislative history.[8] While the Court of Appeals acknowledged the clear intent of the bill's sponsor, Senator Percy, and of the Committee memorandum, the Court chose to look only to the official Senate report on the matter and, though finding the language of that report not as clear as the sponsor's and the above-mentioned memorandum, held that "a fair reading of the Report supports the government's position that the remedy against the government under FTCA is inextricably tied to the remedy against the individual officer under *Bivens* [which is limited by the good faith defense]." App. at 43a. So concluding, the Court of Appeals reversed and remanded the matter for trial of the good faith issue.

Judge Butzner's dissent strongly agreed with the District Court that the legislative history supported petitioner's position. Refusing to follow the majority's invocation of "federal common law," he chose instead to remain consistent with the principles of *respondeat superior,* upon which the Federal Torts Claim Act is founded. Under the doctrine of *respondeat superior,* Judge Butzner found it inappropriate to allow the government to invoke as the principal an immunity (good faith defense) personal only to its agents.

As a practical matter, whether or not the United States can assert the good faith defense under the FTCA will have enormous impact on the ability of innocent victims

---

[8]The government also raised several other technical defenses such as an alleged distinction between "privilege" and "immunity," arguing that the good faith defense was really a privilege and thus subject to invocation by a principal, the United States, under the doctrine of *respondeat superior.* This and other arguments were rejected by the Court of Appeals. Note 8, App. at 40a.

to recover for damages sustained by virtue of illegal federal police activities. In petitioner's case, for example, the District Court's finding of illegal intrusion or of actual psychological damages suffered is uncontested. Whether she can, however, effectively dispute a claim of good faith (here presumably innocent mistake with animus absent) is—though not conceded—more difficult than showing constitutional deprivations alone. And certainly the Court of Appeals decision leaves petitioner in no better a position than if the Percy 1974 amendment had not been enacted.

It is represented that hundreds, if not thousands, of persons with claims against the government under § 2680 (h) will be affected by the final court ruling on the subject. At a time when this Court has been issuing numerous rulings on the good faith defense, the most recent, e.g., *Butz v. Economou*, ___ U.S. ___, 46 U.S.L.W. 4952 (June 29, 1978), a definitive ruling by this Court on the propriety of the application of the defense under § 2680 (h) is of critical importance.

CONCLUSION

For the foregoing reasons, petitioner urges that this Court issue a Petition for Certiorari to review the decision below.

Respectfully submitted,

JOHN D. GRAD
HIRSCHKOP & GRAD, P.C.
108 North Columbus Street
Post Office Box 1226
Alexandria, Virginia 22313
(703) 836-6595

ARTHUR H. BLITZ
8700 Georgia Avenue
Silver Spring, Maryland 20910
(301) 588-8750

ROBERT D. SALZER
8700 Georgia Avenue
Silver Spring, Maryland 20910
(301) 589-2442

Counsel for Petitioner.

September 18, 1978

APPENDIX

APPENDIX

§1346. United States as defendant.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

---

§2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

---

§2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to–

* * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Filed Jan 26, 1977]

ELIZABETH ANN NORTON, Plaintiff,	)	
v.	)	Civil Action No. 76-3-A
JOHN TURNER, ET AL., Defendants.	)	

ORDER

In accordance with the memorandum of the Court this day filed, and deeming it just and proper so to do, it is ADJUDGED AND ORDERED that the defendants' motion for summary judgment be, and the same is hereby, denied.

It is further ORDERED that the plaintiff's motion for summary judgment as to the United States on the issue of liability be, and the same is hereby, granted.

Let the Clerk set this matter for the next civil docket call. Let the Clerk further send a copy of this Order and the accompanying Memorandum to all counsel of record.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: 1/26/77

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ELIZABETH ANN NORTON, Plaintiff,	)	Civil Action No. 76-3-A
v.	)	
JOHN TURNER, ET AL., Defendants.	)	

MEMORANDUM

Plaintiff, Elizabeth Ann Norton, brings this action against certain federal and local law enforcement officers and the United States of America to redress an alleged wrongful entry and search of her apartment. The plaintiff seeks both monetary and declaratory relief. The action is brought pursuant to the Constitution of the United States, 42 U.S.C. § 1983 and state law. Jurisdiction is attained pursuant to 28 U.S.C. § § 1331, 1332, 1343 and 1346(b). The matter comes before the Court on cross-motions for summary judgment as to liability.

The gravaman of the plaintiff's complaint is the contention that her apartment was illegally entered by the individual defendants in violation of her rights under the Fourth Amendment to the Constitution. Her constitutional claims are premised upon *Bivens* v. *Six Unknown Agents,* 403 U.S. 388 (1971), and the provisions of 42 U.S.C. § 1983. Pendent state common law claims of assault, trepass, and false imprisonment are also asserted. The United States of America is sued under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), 2674,

and 2680(h).[1] The defendants contend that their actions were legal under the Fourth Amendment and the common law. Secondarily, they maintain that they acted under a reasonable good faith belief in the legality of their actions and, therefore, are immune from suit. *See Pierson* v. *Ray,* 386 U.S. 547, 557 (1967); *Bivens* v. *Six Unknown Agents,* 456 F.2d 1339 (2d Cir. 1972); *Hill* v. *Rowland,* 474 F.2d

---

[1] 28 U.S.C. §1346(b) confers exclusive jurisdiction upon district courts

> of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under cirucmstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The liability of the United States is predicated upon 28 U.S.C. §2674 which provides

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

[footnote continued]

1374, 1377 (4th Cir. 1973), Plaintiff's contentions are that the alleged entry was illegal, that the claims of immunity of the individual agents are not ripe for decision under the instant motions, and the the immunity defense, if any, is not available to the United States.

I. The Facts

The parties have stipulated many of the material facts. At approximately 8:13 p.m. on Saturday, March 15, 1975, Officer Donald C. Green of the Alexandria, Virginia Police Department received an anonymous telephone call regarding the whereabouts of Patricia Campbell Hearst, then a nationally renowned fugitive. William and Emily Harris were also being sought on related matters. Officer Green immediately advised Agent Mackey of the Federal Bureau of Investigation's Alexandria field office of the call and relayed the conversation as follows:

An action of this nature is authorized by 28 U.S.C.A. §2080(h)

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

> "You know Patty Hearst is supposed to be in Pennsylvania but she's not. She's currently at 649 Notabene Drive, Apartment 10, in Alexandria and she's been there for the last week or ten days. She has cut her hair and she's with one of the people who left with her from California."

Agent Mackey thereupon advised Special Agent-in-Charge, Robert Kunkel, who directed that the investigation of the anonymous tip be headed by Special Agent Robert O'Brien. Special Agent O'Brien was the Coordinator for the Alexandria Division for the nationwide search for Miss Hearst and other allegedly connected fugitives. The Hearst investigation was code named HEARNAP by the FBI. Upon being contacted and advised of the tip, Special Agent O'Brien took charge of the investigation. He and three other FBI agents proceeded to the Alexandria Police Department headquarters. It should be noted that the HEARNAP file contained at that time, in part, the following information: (1) the fugitives generally resided in low income areas; (2) their general mode of transportation was either rental cars or used vans; and (3) Ms. Hearst had reportedly cut her hair in September of 1974.

Upon arriving at the Alexandria Police Department, it was determined through the use of locator crisscross indexes published by the telephone company, that the referred to apartment was occupied by one Victor Henry Evol, but no telephone number could be located. A check of police department records revealed that Mr. Evol was a black male who had been interviewed on July 23, 1974 by Alexandria police officers in connection with a complaint involving a concealed weapon. The information attained revealed that no charges had been brought against Mr. Evol.

Stipulated facts reveal that on March 15, 1975, Evol was not the tenant of the apartment. Plaintiff had leased

the apartment on November 1, 1974 shortly after Mr. Evol had vacated the premises. On March 12, 1975, three days prior to the incident in issue, Ms. Norton, the plaintiff, was interviewed at her apartment by a local FBI agent, Larry Bartlett, in connection with an investigation of a stolen automobile. Agent Bartlett's report concerning this interview was neither dictated nor transcribed until subsequent to the incident involved herein. Accordingly, the FBI's then recent contact with and identification of the occupant of 649 Notabene Drive, Apartment 10, was not contained in the briefing preparatory to the investigation of the Hearst tip.

At approximately 9:30 p.m., March 15, 1975, the four FBI agents and two Alexandria detectives drove to a site close to the apartment in question. They were there joined by two uniformed police officers. Agent O'Brien furnished all the agents and officers with photographs and physical descriptions of the fugitives and advised them that each fugitive had been designated by the FBI as armed and dangerous. One of the Alexandria detectives, Mr. Turner, was then dispatched to survey the building. The apartment building, located in a well lighted low income area, is a separate brick structure containing ten units. The front entrance is the only method of ingress or egress save the windows. Apartment 10 is located on the third floor of the building and has only a rear view. On the night in question, there was no resident manager at the apartments and the name of the occupant of Apartment 10 was not contained on the vestibule mailbox. Parked outside the apartment units was a white van with Pennslyvania license plates.

Upon Detective Turner's return from his survey, the agents and officers proceeded to the apartment. Agent O'Brien at the parking lot briefing advised the officers of

three possibilities: (1) the HEARNAP fugitives Hearst, Harris and Harris were in the apartment; (2) the tip was an attempt to set up an ambush; or (3) the tip was an attempt to harass an innocent party. At approximately 10:07 p.m., Agents O'Brien and McLaughlin and Detectives Turner and Bland proceeded to Apartment 10. The light was on and music was being played when the agents arrived. Two minutes later, Agent O'Brien knocked on the door of the apartment. At this time Ms. Norton was at home alone. She was fully dressed. The door to Apartment 10 did not contain a peephole.

Ms. Norton responded to the knock by asking "Who's there" or "Who is it"? Agent O'Brien indicated that it was the FBI. Ms. Norton requested identification. While the details of the ensuing conversation are disputed, the parties agree that the plaintiff never was shown the agents' credentials. The plaintiff turned to call FBI offices in an effort to secure some verification that the men at the door were, in fact, agents. The agents and detectives then attempted to forcibly open the door by striking it. Ms. Norton, fearing that the door would be destroyed, unlatched the lock and the door sprang inwardly open. The law enforcement officers entered the apartment with weapons drawn. A search of the apartment revealed no traces of the sought after fugitives.

Agent O'Brien then advised the plaintiff of the call which prompted the intrusion. It has subsequently been determined that the "tip" was probably made by a neighbor of the plaintiff with whom Ms. Norton frequently quarreled. No attempt was made by the defendants to obtain a search warrant prior to the forced entry.

II. The Legality of the Defendants' Conduct

With respect to the alleged constitutional torts, the threshold issue presented is whether or not the defendants'

actions were violative of the Fourth Amendment's prohibition against unreasonable searches and seizures. In the context of the instant controversy, the issue is framed in terms of the standards applicable to the execution of an arrest warrant at the residence of a third party not named in the warrant. The Supreme Court, to date, has not directly confronted the issue. *See United States* v. *Watson*, 423 U.S. 411, 418 n.6 (1976); *Gernstein* v. *Pugh*, 420 U.S. 103, 113 n.13 (1975); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 480-481 (1971); *Jones* v. *United States*, 351 U.S. 493, 499-500 (1958). It is clear, however, that "if the police intend to conduct a search of a man's home for a suspect, they must *at least* have probable cause to believe that he is on the premises." *Lankford* v. *Gelston*, 364 F.2d 197, 202-203 (4th Cir. 1966) (emphasis added). *See also United States* v. *James*, 528 F.2d 999, 1017 (5th Cir. 1976); *United States* v. *Brown*, 467 F.2d 419, 423 (D.C. Cir. 1972); *United States* v. *McKinney*, 379 F.2d 259, 262-263 (6th Cir. 1967).[2] Accordingly, the pivotal inquiry is the existence of probable cause that Ms. Hearst occupied Apartment 10 at the time the agents forcibly entered the apartment. To paraphrase an oft quoted definition of probable cause, this Court must determine whether, at the moment of the entry, the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that Ms. Hearst was inside the apartment. *Berger* v. *New York*, 388 U.S. 41, 55 (1967); *Beck* v. *Ohio*, 379 U.S. 89, 91 (1965); *Draper* v. *United States*, 358 U.S. 307, 313 (1959); *Husty* v. *United States*, 282 U.S. 694, 700-701 (1931); *Carroll* v. *United States*, 267 U.S. 132, 162 (1925). This assessment must be made in view of the cumulative effect of the facts then existing and the totality of the circumstances.

[2] The plaintiff contends that the police are required to obtain a search warrant in order to lawfully execute an arrest warrant in the dwelling of a third party. Only exigent circumstances, it is submitted, can relieve the officers of this obligation. *Cf. Virgin Islands v. Gereau*, 502 F.2d 914, 928 (3rd Cir. 1974). The Court is satisfied that *if* the officers had probable cause to believe that Ms. Hearst was in the apartment, their subsequent conduct was justified. The fugitives in question had demonstrated a capacity for both violence and elusive flight. *See United States v. Cravero*, No. 75-2710 at n. 30 and text (5th Cir. Aug. 6, 1976).

The Court has little difficulty in concluding that the anonymous tip,[3] standing alone, is not sufficient to justify the challenged police action. The informant chose to remain anonymous. The underlying circumstance detailing the manner in which the information was gathered is also unknown. *See Spinelli* v. *United States*, 393 U.S. 410, 416 (1969). The informant had not previously provided any, much less accurate, information to the police. *Jones* v. *United States*, 362 U.S. 257, 267-272 (1960); *United States* v. *Fuller*, 441 F.2d 755 (4th Cir. 1971). Nor did the informant supply information against her penal interest. *United States* v. *Harris*, 403 U.S. 573 (1971). Aside from the conclusory statement that Ms. Hearst was occupying Apartment 10, the only factual assertions contained in the tip were that (1) Ms. Hearst had come to Alexandria from Pennsylvania and (2) she had cut her hair. Both of these facts were consistent with information contained in the FBI HEARNAP investigation file. It was public knowledge, however, that Ms. Hearst was last known to be taking refuge in Pennsylvania. The statement concerning Ms. Hearst's appearance applies with

[3] To the extent that there is any material difference, the Court is concerned with the tip as conveyed to the defendants rather than as later transcribed by the Alexandria Police Department. The parties agree that the statement quoted in the main text hereof represents the information available to these defendants at the time of their actions.

equal accuracy to literally millions of women. In short, neither the tip itself nor the informant display the indicia of reliability necessary to warrant the forcible entry into the dwelling of a citizen of the United States in the dead of night. *Cf. Ker* v. *California,* 374 U.S. 23 (1963). Indeed, the Court would be hard pressed to imagine a less trustworthy basis for the drastic action taken. As noted by Judge Sobeloff, information from an "anonymous and unverifiable source is [not] probable cause for the search of a home." *Lankford* v. *Gelston, supra,* 364 F.2d at 202. The Court must also, however, consider any additional information obtained during the investigation which may fortify the otherwise deficient tip and, hence, support a finding of probable cause. *Whitely* v. *Warden,* 401 U.S. 560, 567 (1971); *Spinelli* v. *United States,* 393 U.S. 410, 416 (1969); *Draper* v. *United States,* 358 U.S. 307, 313 (1969).

The defendants assert that several facts independently verified the accuracy of the anonymous tip. First, the defendants point to their police station-house investigation which erroneously revealed that a black male, who had previously been questioned but not charged in connection with a weapons violations, was the occupant of the apartment. The correlation between the inaccurate fact and the location of Ms. Hearst can only, generously, be described as tenuous. The Court similarly finds little probative value in the fact that the apartment is located in a lower income area of the City of Alexandria, Virginia. The strongest evidence the defendants have presented on this issue is the presence of a van with Pennsylvania license plates in the proximity of the plaintiff's apartment.[4] This

[4]The van, as it turns out, belongs to the plaintiff. The defendants, however, were unaware of this fact.

fact conformed with the then current information contained in the HEARNAP file as to the fugitive's former location and general mode of transportation. No attempt was made to ascertain who was the owner of the vehicle and whether it had any connection with the Hearst investigation. Even with the benefit of this information, however, Agent O'Brien cautioned the other law enforcement officials that the tip could be a prank. The only additional facts that the defendants submit support a finding of probable cause are that (1) a young female voice, as opposed to that of a black male, responded to their knock on the door; and (2) that the plaintiff refused to open the door without verifying the identity of the intruders.

A finding of probable cause in this case would give unprecedented weight to a conclusory tip from an anonymous source whose accuracy is purportedly verified only by the proximity of a vehicle bearing Pennsylvania license plates to the apartment in question. Fortunately, the Constitution requires a firmer basis of justification before sanctioning a forcible intrusion into one's home. *Lankford* v. *Gelston, supra.* The so-called corroboration offered by the defendants was, at best, merely consistent with a belief that Ms. Hearst occupied Apartment 10. The evidence was not affirmatively probative of that fact. In short, the Court concludes that, at the moment of entry, the facts and circumstances within the defendants' knowledge and of which they had reasonably trustworthy information were not sufficient to warrant a prudent man into believing that Ms. Hearst was inside the apartment. Accordingly, the plaintiff has established that the defendants have violated her rights under the Fourth Amendment to be secure from unreasonable searches and seizures.[5]

[5]The Court's conclusion that the entry was illegal results in the establishment of a prima facie case of assault, trespass and false

[footnote continued]

III. Immunity Defenses

(A) Individual defendants

The individual defendants have moved for summary judgment on the basis of their alleged entitlement to a qualified immunity from monetary liability. Each of the individual defendants are law enforcement officers who, at the time of the incident in question, were acting within the scope of their official duties. Accordingly, these defendants will not be subjected to monetary liability under the constitutional tort claims if they acted under a reasonable good faith belief in the legality of their actions.[6] *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967); *Hill* v.

---

imprisonment under Virginia law. *See Montgomery Ward & Co. v. Wickline*, 188 Va. 485, 50 S.E.2d 387 (1948); *Burgess v. Commonwealth*, 136 Va. 697, 188 S.E.2d 273 (1923). The defendants, of course, remain free to assert any available defenses.

[6]The immunity afforded a police officer at common law and under 42 U.S.C. §1983 was articulated by the Supreme Court in terms of "good faith and probable cause." *Pierson v. Ray, supra*, 386 U.S. at 555 and 557. *See also Scheuer v. Rhodes*, 416 U.S. 233, 245 (1974). The Court of Appeals in *Bivens v. Six Unknown Agents*, 456 F.2d 1339, 1347 (2d Cir. 1972) clarifies that the term "probable cause" when used in the context of immunity is not identical with the term "probable cause" in the constitutional sense. In the context of immunity, probable cause translates into a reasonable good faith belief in the legality of the conduct. *Bivens v. Six Unknown Agents, supra*, 456 F.2d at 1347. This is a less stringent standard than that used in determining whether sufficient "probable cause" exists to justify the issuance of an arrest or search warrant. *See Bivens v. Six Unknown Agents, supra*, at 1348-49 (concurring opinion). In order to successfully assert the immunity defense, an officer must show (1) he acted in a good faith belief that his conduct was lawful; and (2) his belief was reasonable. The former standard is subjective while the latter is objective. *Bivens v. Six Unknown Agents, supra* at 1348.

This analysis appears to be the prevailing standard throughout the nation. *See G. M. Leasing Corp. v. United States*, ___U.S.___, 45 U.S.L.W. 4098, 4104 (U.S. Jan. 12, 1977); *Hill v. Rowland*,

[footnote continued]

Rowland, 474 F.2d 1374, 1377 (4th Cir. 1973); *Bivens* v. *Six Unknown Agents*, 456 F.2d 1339, 1347 (2d Cir. (1972). *Cf. G. M. Leasing Corp.* v. *United States*, ——— U.S. ———, 45 U.S.L.W. 4098, 4104 (U.S. Jan. 12, 1977). The Court is of the further opinion that this qualified immunity is applicable to actions brought under Virginia law. *Yeatts* v. *Minton*, 211 Va. 402, 177 S.E.2d 646 (1970); *Davidson* v. *Allam*, 143 Va. 367, 130 S.E. 245 (1925). The cases cited by the plaintiff to the contra involve defendants who were private citizens as opposed to police officers acting within the scope of their official duties, and hence, are inapposite. *See, e.g., Zayre of Virginia, Inc.* v. *Gowdy*, 207 Va. 47, 147 S.E.2d 710 (1966); *Montgomery Ward & Co.* v. *Wickline*, 188 Va. 485, 50 S.E.2d 387 (1948).

The Court is not satisfied, however, that the defendants' entitlement to the qualified immunity in the instant case can summarily be established. The applicability of this immunity is dependent upon factual findings. Where these factual matters are undisputed, *i.e.*, in the face of uncontroverted affidavits, summary judment may be appropriate. *Midwest Growers Co-op Corp.* v. *Kirkemo*, 533 F.2d 455 (9th Cir. 1976); *Burgwin* v. *Mattson*, 522 F.2d

---

474 F.2d 1374, 1377 (4th Cir. 1973); *Jones v. Perrigan*, 459 F.2d 81, 83 (6th Cir. 1972); *Rodriquez v. Jones*, 473 F.2d 559, 605 (5th Cir. 1973); *Tritsis v. Backer*, 501 F.2d 1021 (7th Cir. 1974); *Apton v. Wilson*, 506 F.2d 83, 92-93 (D.C. Cir. 1974); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975). Moreover, there is no distinciton in this regard between an action brought against state officials under 42 U.S.C. §1983 or one brought against a federal agent under a *Bivens*-type claim. *See, e.g., Rodriquez v. Jones*, 473 F.2d 559 (5th Cir. 1973); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975); *Bivens v. Six Unknown Agents, supra*, 456 F.2d 1339 (2d Cir. 1972); *Paton v. LaPrade*, 524 F.2d 862 (3d Cir. 1975).

1213 (9th Cir. 1975); *Brubaker* v. *King*, 505 F.2d 534 (7th Cir. 1974); (*Tritsis v. Backer*, 501 F.2d 1021 (7th Cir. 1974).) In the instant case, however, despite the stipulation of many facts, there remains an unresolved factual issue concerning the number of false anonymous tips that the defendants had received. The plaintiff represents that the defendants, prior to this incident, had received approximately 50 false tips. Discovery relating to these tips had not been completed by the time the motions now under consideration were filed. The reasonableness of the defendants' belief in the whereabouts of Ms. Hearst – an objective standard – may be questioned in light of numerous and allegedly equally nonmeritorious "tips". Accordingly, the Court will deny the individual defendants' motion for summary judgment at this time. *See Jaroslawicz* v. *Seedman*, 528 F.2d 727, 737 (2d Cir. 1975); *Laverne* v. *Corning*, 522 F.2d 1144, 1147 (2d Cir. 1975). *Cf. Pierson* v. *Ray*, 386 U.S. 547, 557 (1967).

(B) Immunity of the United States

The liability of the United States arises, if at all, under the 1974 amendments to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.*.[7] The United States submits that it is entitled to assert the defenses of its agents to defeat the plaintiff's claim under the Act. In other words, the United States views its own liability as being coterminous with that of its officers. For the reasons that follow, the Court concludes otherwise.

---

[7]The parties have not raised, at least at this juncture, any questions relating to the difficulties in pursuing a claim stemming from a constitutional violation within the statutory framework primarily designed to deal with negligence actions. *See* Boger, Gitenstein and Verkuil, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis, 54 U.N.C. L. Rev. 497, 517-543 (1976).

The United States advances two arguments in support of its position. First, the government maintains that illegal searches and seizures conducted in a reasonable good faith belief in their legality are not "wrongful" within the meaning of the FTCA. *See* 28 U.S.C. § 1346(b). The imposition of liability for conduct which is not wrongful, it is submitted, would contravene Supreme Court decisions which prohibit the application of strict liability theories under the FTCA. *See, e.g., Dalhite* v. *United States*, 346 U.S. 15 (1953); *Laird* v. *Nelms*, 406 U.S. 797 (1972).

This argument suffers the defect of a false premise. The immunity of individual officers does not serve to defeat the existence of a tort – it merely provides a defense to monetary liability.

> "Such immunity does not mean that conduct which would amount to a tort on the part of other defendants is not still equally tortious in character, but merely that for the protection of a particular defendant, or interests which he represents, he is given absolution from liability."

W. Prosser, The Law of Torts, ch. 26 at 970 (4th ed. 1971). Indeed, it has been recognized that the "good faith defense in a suit for damages brought against any federal official . . . is not assertable in the face of a quest limited to injunctive, declaratory or mandamus relief." *National Treasury Employees Union* v. *Nixon*, 429 F.2d 587, 509 (D.C. Cir. 1974). *See also Timmerman* v. *Brown*, *528 F.2d* 811, 814 (4th Cir. 1975). The courts will grant injunctive relief to remedy Fourth Amendment violations under appropriate circumstances. *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966); *Illinois Migrant Council* v. *Pilliod*, 398 F. Supp. 882 (N.D.Ill. 1975). In short, the qualified immunity of a law enforcement officer does not

eliminate the wrongfulness of his conduct. An otherwise illegal search does not attain legality merely because the offending officer is not subject to monetary liability. Accordingly, the plaintiff herein is not attempting to impose liability without fault. On the contra, the Court has already concluded that fault exists. The pertinent issue is whether the plaintiff's injuries are compensable under the FTCA regardless of the potential immunity of the individual defendants.

The second argument advanced by the United States is of more substance. As the government's liability under the FTCA is in the nature of *respondeat superior,* the United States asserts that it is entitled to the defenses of its employees. There is no disputing that both the structure of the FTCA[8] and the case law arising thereunder establish that "the Government was to be made liable according to state law under the doctrine of *respondeat*

[8] *See* 28 U.S.C. §2674 which provides in part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, *in the same manner and to the same extent as a private individual under like circumstances.* (emphasis supplied)

28 U.S.C. §1346(b) provides in part:

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death *caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*

superior . . . " *Laird* v. *Nelms, supra,* 406 U.S. at 801. *See also Feres* v. *United States,* 340 U.S. 135 (1950). Employers, moreover, are generally entitled to assert defenses available to their employees. Restatement (Second) of Agency §219 (1957).

A colorable argument can be fashioned that an agent's immunity from civil liability is not a defense which can be asserted by a principal.[9] This Court is not satisfied, however, that the resolution of the important legal issue presented in the instant case should be dictated by the conceptual niceties which constitute the basis for this contention. A more concrete foundation for the Court's conclusion lies in the intent of Congress in enacting the legislation creating a cause of action against the United States.

Prior to 1974, the doctrine of sovereign immunity and the explicit exclusion of intentional torts from the coverage of the FTCA precluded a victim of an illegal search and seizure from obtaining a remedy against the United

[9] Commentators have made a distinction between privileges and immunities describing a principal's ability to assert the defenses of his agent under vicarious liability theory. *See* Restatement (Second) of Agency §217 (1957); *Cf.* W. Prosser, The Law of Torts, ch. 26 p. 970 (4th ed. 1971). A principal is said to be able to avail himself of his agent's privileges, but not his immunities. A law enforcement officer's defense to monetary liability has been termed an immunity by some, *see, e.g., Pierson v. Ray, supra,* 386 U.S. at 555; *Bivens v. Six Unknown Agents, supra,* 406 U.S. at 397; W. Prosser, The Law of Torts §132 (4th ed. 1971); 2 F. Harper and F. James, The Law of Torts §29.8 (1956); but as a privilege by others; *see, e.g.,* Restatement (Second) of Torts §§10, 121(b), and a simple defense as opposed to either an immunity or privilege by at least one court. *See Bivens v. Six Unknown Agents, supra,* 456 F.2d at 1347. Faithful adherence by the courts to these distinctions in discussing the shielding of officers from monetary liability is absent.

States. An aggrieved citizen's sole source for monetary compensation lay in an action against the individually offending officer brought under *Bivens* v. *Six Unknown Agents*, 403 U.S. 388 (1971). In 1974, however, the FTCA was amended to include the following:

> *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. 28 U.S.C. § 2680(h) (as amended).

As expressed in the Senate Report accompanying the amendment, "[t]he effect of this provision is to deprive the Federal Government of the defense of sovereign immunity in cases . . . [involving] the same kind of conduct that is alleged to have occurred in *Bivens* (and for which the case imposes liability upon the individual Government officials involved.)"[10] S. Rep. No. 93-588, 93d Cong. 2d Sess., 1974 U.S. Code Cong. & Ad. News 2789, 2790 (1974).

The 1974 amendment to the FTCA[11] had its genesis in a series of ill-conceived and highly publicized narcotic

[10]The above-quoted passage and the entire Senate Reports amply refute the defendants' contention that the 1974 amendment does not apply to the so-called constitutional torts.

[11]Pub. L. 93-253 §2, 88 Stat. 50 (March 16, 1974). The legislative history of this provision is somewhat less developed than one

[footnote continued]

raids which took place in the spring of 1973. The most widely publicized incidents involved the unannounced forcible night-time entry into the homes of two families by federal narcotic agents. These raids occurred in Collinsville, Illinois. Senator Percy of Illinois was scheduled to conduct hearings concerning the reorganization of the various drug law enforcement agencies. These hearings

might have anticipated. The amendment was attached by the Senate to legislation initiated in the House of Representatives which pertained to the reorganization of certain drug law enforcement agencies. The only apparent association between the amendment to the FTCA and the House bill is the fact that the Collinsville raid was carried out by narcotics agents. The only source of legislative intent of the FTCA amendment in the House of Representatives is to be found in the debates occurring after the Senate had passed the amendment. The debate in the House focuses on the germaneness of the provision to the proposed reorganization of drug law enforcement agencies and the desirability of a more comprehensive approach to the problem of remedying illegal searches and seizures. *See* 120 Cong. Rec. 5285-5290 (1974). The only substantive analysis of the legislation was provided by Representative Wiggins who stated:

> "[t]he amendment creates a civil cause of action by amendment to the Federal Tort Claims Act for intentional torts committed by law enforcement officers. The specific problem envisioned by the proponents of the amendment were Fourth Amendment violations where a police officer may improperly enter the premises of a suspect.
>
> The purpose of the amendment was to give a civil remedy to the aggrieved person for injury and damages sustained by reason of the entry." 120 Cong. Rec. 5286-5287 (1974) (Remark by Rep. Wiggins).

These comments support the Court's view discussed *infra*, to the effect that the legislation was remedially oriented.

A more detailed account of the political considerations surrounding the passage of the amendment can be found in Boger, Gitenstein and Verkuil, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis, 54 U.N.C. L. Rev. 497, 500-517 (1976).

were expanded to include testimony concerning the Collinsville incidents. In the report stemming from these hearings, Senator Percy proposed to limit the abuses done by federal officers, in part, by amending FTCA so as to allow actions by aggrieved citizens against the United States.[12] The Senator gave two reasons why an action must lie against the United States as opposed to one solely against the agents.

> While this [an action against an individual agent] gives victims of abusive tactics some opportunity for relief, their remedy is *severly limited by the ease with which agents can usually establish the defense of having acted in good faith and with probable cause.* Moreover, causes of action against officials as individuals will, on occasion, be virtually worthless since government employees may be so lacking in funds as to be judgment proof.

S. Rep. No. 93-469, 93d Cong., 1st Sess. 36 (1973) (Individual views of Senator Percy) (emphasis supplied). Senator Percy concluded his statement with an expressed intention to introduce legislation implementing his views. It is clear from the above quoted passage that Senator Percy's view of an effective tort remedy did not include the invocation by the United States of the immunity defenses of its agents.

Shortly thereafter Senator Percy introduced the promised legislation.[13] The Senate Report accompanying the bill states that

[12] S. Rep. No. 93-469, 93d Cong. 1st Sess. The second prong of Senator Percy's attack on law enforcement abuses was the repeal of the "no-knock" authority granted under 21 U.S.C. §879(b). This was eventually accomplished in Pub. L. No. 93-481, 88 Stat. 1455.

[13] A similar piece of legislation drafted by the Justice Department and introduced by Senator Hruska of Nebraska was also

[footnote continued]

> this provision should be viewed as a counterpart to the *Bivens* case and its progeny, in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).

S. Rep. No. 93-588, 93d Cong. 2d Sess., 1974 U.S. Code Cong. & Ad. News 2789, 2791 (1974). The Senate Report had earlier characterized the Supreme Court's decision in *Bivens* as creating "a right of action against Federal agents for illegal searches and seizures conducted in bad faith *or* without probable cause." 1974 U.S. Code Cong. & Ad. News at 2790 (1974) (emphasis supplied). The Report continues to note that the amendment "would submit the Government to liability whenever its agents act under color of law so as to injure the public through search and seizures that are conducted without warrants *or with warrants issued without probable cause.*" 1974 U.S. Code Cong. & Ad. News at 2791 (1974) (emphasis supplied).

Both the United States and the plaintiff point to the Senate Report in support of their respective positions. The United States contends that the repeated references to *Bivens* reflect an intent to make the government's liability coterminous with that of its agents. In other words,

being considered at that time. S. Bill 2558, 93d Cong., 1st Sess., 119 Cong. Rec. 33499 (1973). While there were differences between Senator Hruska's proposed bill and the ultimately enacted legislation, those differences do not bear on the issue before the Court. *See* Boger, Gitenstein and Verkuil, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis, 54 U.N.C. L. Rev. 497, 510-517 (1976). For a discussion of other proposals concerning illegal searches and seizures, *see* Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives, 1975 Wash. U.L.J. 621 (1975).

Congress intended to incorporate *Bivens* in its entirety, including the immunity doctrines arising thereunder.

While the Court cannot conclude the government's argument to be unreasonable, it is the Court's view that the more logical interpretation is that the Senate Report illustrates the congressional intention of providing a remedy to victims of illegal searches and seizures regardless of the motivation of the offending governmental agent. The Senate repeatedly utilized disjunctive language in describing the circumstances under which liability would attach. By using phrases such as "bad faith *or* without probable cause", and "without warrants *or* with warrants issued without probable cause" Congress seemingly intended to provide for monetary recovery in instances where the offending federal agent would enjoy immunity.[14] The defendant attributes this language to a mistakingly broad reading of *Bivens* by the Senate. While this may or may not be accurate, the relevant inquiry is into what the Senate *thought Bivens* stood for.

The Senate Report outlined the reasons behind the considered need to amend the FTCA as follows:

> For years scholars and commentators have contended that the Federal Government should be liable for the tortious acts of its law enforcement officers when they act in bad faith or without legal justification. However, the Federal Tort Claims Act (28 U.S.C. 2671-2680 the embodiment of sovereign

[14]It is difficult to conjure a situation not involving actual malice where an agent acting under a warrant later found to have been improvidently issued could be found liable for monetary damages in an action under 42 U.S.C. §1983 or under *Bivens*. It must be pointed out, however, that it is not clear whether Congress was using the term "probable cause" in the constitutional sense, or in the context of immunity. *See* note 6, *supra*.

> immunity in the United States Code, protects the Federal Government from liability where its agents commit intentional torts such as assault and battery. The injustice of this provision should be manifest—for under the Federal Tort Claims Act a Federal mail truck driver creates direct federal liability if he negligently runs down a citizen on the street but the Federal Government is held harmless if a federal narcotics agent intentionally assaults that same citizen in the course of an illegal "no-knock" raid.

1974 U.S. Code Cong. & Ad. News at 2791 (1974). The foregoing passage is revealing in two respects. First, it once again states the need to impose liability against the government in terms of "bad faith or without legal justification." Secondly, the Senate compares the victim of an illegal search to the victim of an automobile accident—the latter being entitled to compensation regardless of the good faith of the government's driver. These statements reflect a concern with providing a remedy. The remedial orientation of the legislation is made explicit in the closing sentence of the Report which states: "The Committee urges speedy adoption of this measure as a minimal first step in providing a remedy against the Federal Government for innocent victims of Federal law enforcement abuses." An innocent victim is no less in need of a remedy where the injurious conduct, though illegal, is motivated by a reasonable good faith belief in its legality.

There is more direct support for the Court's conclusion that Congress did not intend to permit the United States, as one commentator put it, "to escape liability under the new statute by retreating behind various defenses that had been created under *Bivens* or Section 1983." Boger, Gitenstein and Verkuil, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Anal-

ysis, 54 U.N.C.L. Rev. 497, 515 (1976). The specific issue before the Court had been raised by the authors of the legislation and discussed in a memorandum explaining the proposed amendment. The Senate memorandum succinctly states:

> "It is not the intention of this amendment to allow any other defenses [besides those in section 2080 (h)] that may be available to individual defendants by state or federal law, custom or practice to be asserted [by] the government. Congress does not oppose, however, the assertion of defenses of good faith and reasonable belief in the validity of the search and arrest on behalf of individual government defendants, so long as it is understood that the government's liability is not coterminous with that of the individual defendants."

Senate Comm. on Gov't Operations, Memorandum No-Knock Legislation, August 28, 1973, at 5.[15] This memorandum, the views of the amendment's author and the remedial orientation of the Senate Report all lead to the conclusion that the immunity available to an individual agent in a *Bivens*-type action is not a defense available to the United States to a claim brought under the FTCA.

The congressional decision to remove the shield of official immunity from the government is founded on solid policy considerations. The doctrine of sovereign immunity curiously[16] impregnated American juris-

[15]The Court, regretfully, has been unable to secure an exact copy of this memorandum. The portion quoted herein is found in Boger, Gitenstein and Verkuil, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis, 54 U.N.C. L. Rev. 497, 515 (1976).

[16]"Just how an immunity which had its roots in feudalism and in a political philosophy associated with the divine right of kings was transplanted to the new republic in America remains

[footnote continued]

prudence at an early age. *See, e.g., Cohens v. Virginia,* 19 U.S. (6 Wheat) 264, 411-412 (1821). This doctrine precluded an aggrieved citizen from moving directly against the government to redress injuries suffered at the hands of government officials. In order to provide some relief to the victim of governmental illegalities, the Supreme Court fashioned a concept which has been described as "purest fiction."[17] In *Ex Parte Young,* 209 U.S. 123 (1908), the Court ruled that "when a state official acts under state law in a manner violative of the Federal Constitution, he 'comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.'" *Scheuer v. Rhodes,* 416 U.S. 232, 237 (1974) quoting *Ex Parte Young, supra,* 209 U.S. at 159-160. The fictional basis of *Ex Parte Young* also limits the relief that can be granted. Monetary recovery must come from the pocket of the individual officer and not the sovereign. *Edelman v. Jordon,* 415 U.S. 651 (1974). *See generally* C. Wright, Law of Federal Courts, §48 (3rd ed. 1976).

The possibility of being subjected to personal liability for money damages as a result of the performance of official duties necessitated the creation of a doctrine which would provide some degree of protection to the

something of a mystery." F. James and F. Harper, The Law of Torts, §29.2 p. 1609 (1956). For a thorough discussion of the topic, *see* Jaffe, Suits Against Governments and Officers; Sovereign Immunity, 77 Harv. L. Rev. 1 (1963); Borchard, Government Liability in Tort, 34 Yale L.J. 1, 129, 229 (1924-1925).

[17]C. Wright, Law of Federal Courts § 48, p. 209 (3d ed. 1976).

well-meaning public servant. The resulting doctrine of official immunity is premised upon

> two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Scheuer v. Rhodes, supra, 416 U.S. at 940. (footnote omitted). *Accord, Wood v. Strickland,* 420 U.S. 308, 319 (1975); *Rowley v. McMillan,* 502 F.2d 1326, 1332 (4th Cir. 1974). *Cf. Barr v. Matteo,* 360 U.S. 564, 571 (1959).

The need to provide a remedy to the victim of governmental illegality thus comes in conflict with the considerations giving rise to the doctrine of official immunity. As Mr. Justice Harlan pointedly observed, there are

> "two considerations of high importance which now and again come into sharp conflict—on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities."

Barr v. Matteo, supra, 360 U.S. at 564-565. The doctrine of official immunity represents the judicial resolution of those competing interests. Law enforcement agents do not enjoy an absolute immunity from suit despite the discretionary nature of their duties "because of

the belief that the benefit to society derived from the protection of personal liberties outweighs the detriment of perhaps deterring vigorous police action." *Bivens v. Six Unknown Agents, supra,* 456 F.2d at 1346.

The injustices occasioned by the doctrine of sovereign immunity gave rise to *Ex Parte Young* and the imposition on government officials of personal liability for monetary damages. The fear that this personal liability would unduly inhibit public servants from executing their official responsibilities gave rise to the doctrine of official immunity.[18] In the context of law enforcement, this immunity is articulated in terms of a reasonable good faith belief in the legality of the conduct. Thus, "[t]he concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity." *Scheuer v. Rhodes, supra,* 416 U.S. at 239. Where, as is the case with the FTCA, the sovereign has waived its immunity, the policy considerations which justify immunizing individual law enforcement officers are no longer applicable. *See* 2 F. Harper and F. James, The Law of Torts §29.14 at pp. 1656-1657 (1956).

This has been recognized by other courts as well. The United States sought to raise the defense of immunity in an action brought under the negligence provisions of the FTCA by a person injured in the course of an FBI agent's efforts to foil an attempted act of air piracy. The district court ruled that the United States was not entitled to assert the immunity defenses of its agents. *Downs v. United States,* 382 F. Supp. 713, 749-751 (M.D.Tenn.

[18] This is not to say that the law in this area originated with *Ex Parte Young, supra. See Scheuer v. Rhodes, supra,* 416 U.S. at 239 n. 4. The development of the public servant's defenses to monetary liability, however, has escalated with the increase in actions brought against government officials.

1974). In reversing the trial court on other grounds, the Court of Appeals stated "[t]he prospect of governmental liability for the actions of law enforcement officers should not cause those officers less vigorously to enforce the law. The need for compensation to citizens injured by the torts of government employees outweigh whatever slight effect vicarious liability might have on law enforcement efforts." *Downs v. United States,* 522 F.2d 990, 998 (6th Cir. 1975).

To allow the government to benefit from a doctrine born of sovereign immunity would pervert the clear congressional directive to eliminate sovereign immunity from actions of this nature. As noted by the author of the 1974 amendment to the FTCA, Senator Percy, the effectiveness of a *Bivens*-type remedy is "severely limited" by the doctrine of official immunity. S. Rep. No. 93-469, 93d Cong., 1st Sess. 36. The promise of an effective remedy contained in the 1974 amendment to the FTCA would be largely illusory if the government could assert the immunity defense of its agents. *Cf. Downs v. United States, supra,* 382 F. Supp. at 750.

Concluding therefore that (1) the forcible nighttime entry into the plaintiff's apartment was in violation of her rights secured to her by the Fourth Amendment to the Constitution of the United States; and (2) the United States is not entitled, as a matter of law, to assert the immunity defense available to the individual defendants in an action brought under the Federal Tort Claims Act, the plaintiff is entitled to judgment against the United States on the issue of liability.

An appropriate order will follow.

Date: 1/26/77

/s/ Robert R. Merhige, Jr.
United States District Judge

[Published]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1919

Elizabeth Ann Norton, Appellee,

v.

United States of America, Appellant,

and

John Turner, Robert O'Brien, Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Robert R. Merhige, Jr., District Judge.

Argued April 6, 1978 Decided July 19, 1978

Before WINTER, BUTZNER and WIDENER, Circuit Judges.

Paul Blankenstein, Attorney, Appellate Section, Civil Division, Department of Justice (Barbara Allen Babcock, Assistant Attorney General; William B. Cummings, United States Attorney and William Kanter, Appellate Section, Civil Division, Department of Justice, on brief) for Appellant; John D. Grad (Philip J. Hirschkop, Hirschkop and Grad, P.C.; Arthur H. Blitz; Robert D. Salzer on brief) for Appellee.

WINTER, Circuit Judge:

Elizabeth Ann Norton was awarded summary judgment against the United States and damages in the sum of

$12,500 in her suit under the fourth amendment for violation by federal law enforcement officers of her rights secured by that amendment. In reaching this result, the district court ruled that the United States could not assert as a defense to its liability the good faith and reasonable belief of the officers in the legality of their conduct which provided the basis of the suit. Norton v. Turner, 427 F.S. 138 (E.D. Va. 1977). The correctness of that ruling is the sole issue on appeal. We reverse and remand for futher proceedings.

I.

At approximately eight o'clock on the evening of March 15, 1975, the Alexandria, Virginia, Police Department received an anonymous telphone call advising that the nationally-sought federal fugitive Patricia Hearst was occupying an apartment in the Alexandria area. Federal arrest warrants for her arrest were outstanding. The FBI was immediately notified and, at approximately 9:30 p.m. on the same evening, four FBI agents, together with two local detectives, arrived at the reported address. After surveying the site for approximately thirty minutes, the officers sought entry into the suspect apartment. The officers had been warned that Ms. Hearst should be considered armed and dangerous. No search warrant was either sought or obtained.

The apartment was that of plaintiff who was alone in the apratment. Since it was ten o'clock at night and her door had no peephole for veiwing visitors, she refused to admit the agents. Conversation ensued. Unable to prevail upon plaintiff to open the door, the agents began a forcible entry. Plaintiff, fearing that the door would be destroyed, unlatched the lock and the law enforcement officers entered with weapons drawn. A search of the

apartment revealed no traces of either Patricia Hearst or her suspected companions. After concluding that the anonymous tip was either a hoax or an attempt by a disgruntled neighbor to harass plaintiff, the officers departed.

Plaintiff subsequently brought this suit for damages against both the law enforcement officers involved and the United States. Suit against the local police officers was brought under 42 U.S.C. §1983, while suit against the federal agents was brought directly under the fourth amendment to the Constitution of the United States. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Both the local and federal agents defended the suit, *inter alia,* on the ground that they acted in good faith and with a reasonable belief in the lawfulness of their actions. Damages were claimed against the United States under the Federal Tort Claims Act (FTCA), then recently amended to allow suit against the United States where federal investigative or law enforcement officers commit certain types of intentional torts in the course of conducting searches or making arrests. Pub. L. No. 93-253, §2, 88 Stat. 50 (1974) (amending 28 U.S.C. §2680(h)).[1] The United

[1] Pub. L. 93-253, §2, amended 28 U.S.C. §2680(h) by adding a provisio to it. Section 2680 is the portion of the Federal Tort Claims Act which excepts certain claims from the general waiver of sovereign immunity, thus preserving sovereign immunity as to them. Sub-section (h) preserves immunity with respect to claims arising out of false imprisonment, false arrest, etc., and the provisio reads:

> That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [Tort Claim Procedures] and section 1346(b) of this title *shall apply* to any claim arising, on or after the date of the

[footnote continued]

States also defended on the ground, *inter alia*, of the good faith and reasonable belief in the lawfulness of their actions on the part of its agents.

On cross-motions for summary judgment, the district court first determined that the officers' entry into and search of the apartment had violated palintiff's fourth amendment rights since the officers had insufficient cause to believe that Hearst was inside plaintiff's apartment. 427 F.S. at 143-44. With respect to the good-faith and reasonable-belief defenses of the individual defendants, the court concluded that unresolved issues of facts made summary judgment inappropriate. *Id* at 145-46. As to the United States, however, summary judgment was entered for the plaintiff. After carefully considering both the legislative history surrounding the enactment of the 1974 amendment to the Federal Tort Claims Act and the policy implications of expanded govenmental liability thereunder, the district court concluded that proof of a constitutional violation by federal law enforcement officers is sufficient *per se* to render the government liable for any damages sustained as a result of the unconstitutional conduct. *Id.* at 146-52. Stated otherwise, the United States could not defend its liability on the basis of its agents' good faith and reasonable belief even if it could prove both. Thereafter, upon motion of plaintiff, the district court dismissed the suit against the individual defendants and entered judgment against the United States in the amount of $12,500. This appeal followed.

---

enactment of this provisio, out of assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal Law. (Emphasis added.)

II.

In this appeal the government does not contest the district court's finding that a violation of plaintiff's fourth amendment rights occurred. Nor does it dispute the applicability of 28 U.S.C. § 2680(h), as amended in 1974, to the instant action. The amendment to § 2680(h) is clearly intended to waive the federal government's sovereign-immunity defense in suits brought to redress violations of the fourth amendment committed by federal law enforcement officers. *See* S. Rep. No. 93-588, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 2789.

What is the only issue raised by the government in this appeal is the extent of its liability under FTCA. The United States urges that its liability is no greater than that of its employees. It submits that, under both traditional principles of *respondeat superior* and established FTCA precedent, it is entitled to assert all defenses available to its agents individually, including the defenses of good faith and reasonable belief. Plaintiff, on the other hand, urges that we uphold the district court's more expansive view of governmental liability. We adopt the more limited view of liability urged upon us by the government and hold that the liability of the United States under § 2680(h) is coterminous with the liability of its agents under *Bivens.*

III.

In 1971, the Supreme Court announced a federal damages remedy to redress violations of the fourth amendment by federal law enforcement officers. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, *supra.* While *Bivens* created a federal cause of action sounding in tort cognizable in federal courts under 28

U.S.C. § 1331, it did not delineate the scope of the officer's tort duty. On remand, the Second Circuit concluded that an officer's tort duty under *Bivens* should not be coextensive with his constitutional duty under the fourth amendment. Looking to the traditional doctrine of police-officer liability for common-law torts, the court concluded that an individual officer should escape personal liability if he establishes that he acted "in good faith and [with a] reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted." 456 F.2d 1339, 1348 (2 Cir. 1972). This definition of an individual officer's tort duty under *Bivens* has been widely accepted.[2]

While *Bivens* created a federal tort for certain violations of the fourth amendment, it did not (and indeed could not) impose liability on the officer's employer, the federal government. The federal fisc was protected by the traditional doctrine of sovereign immunity.[3] The inabil-

[2] *See, e.g.*, G.M. Leasing v. United States, 560 F.2d 1011, 1015 (10 Cir. 1977), *cert. denied*, ___U.S.___ (Mar. 20, 1978); Ervin v. Ciccone, 557 F.2d 1260, 1262 (8 Cir. 1977); Rodriquez v. Ritchey, 539 F.2d 394, 400-01 (5 Cir. 1976); Mark v. Groff, 521 F.2d 1376, 1379-80 (9 Cir. 1975); Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974); Tritsis v. Backer, 501 F.2d 1021, 1022-23 (7 Cir. 1974). While this court has never directly held that a *federal* law enforcement officer is entitled to assert the good-faith and reasonable-belief defenses when confronted with a *Bivens* claim, we have so held as to local law enforcement officers who are sued under 42 U.S.C. § 1983. Hill v. Rowland, 474 F.2d 1374 (4 Cir. 1973). In relying heavily on the Second Circuit's analysis in *Bivens*, *Hill* clearly implies (and we agree) that the scope of liability should be the same for federal, state and local law enforcement officers, regardless of whether the claim is predicated on § 1983 or on *Bivens*.

[3] It was reasoned that the tort created by *Bivens* was an intentional tort and that suit against the United States was there-

[footnote continued]

ity to secure a remedy against the United States severely restricted the effectiveness of the *Bivens* remedy. As Senator Percy remarked after conducting hearings into the much-publicized Collinsville drug raids in which innocent persons suffered not insubstantial abuse at the hands of federal narcotics agents:

> While [*Bivens*] gives victims of abusive tactics some opportunity for relief, their remedy is severely limited by the ease with which agents can usually establish the defense of having acted in good faith and with probable casue. Moreover, causes of action against officials as individuals will, on occasion, be virtually worthless since government employees may be so lacking in funds as to be judgment proof.

S. Rep. No. 93-469, 93rd Cong., 1st Sess. 36 (1973) (individual views of Senator Percy).

Consistent with these remarks, Senator Percy proposed a rider to H. R. 8245[4] "to provide a remedy against the United States for the intentional torts of its investigative and law enforcement officers." S. Rep. No. 93-588, *supra*, [1974] U.S. Code Cong. & Ad. News at 2789. Enacted in March, 1974, as Pub. L. NO. 93-253, § 2, this legislation amended FTCA so as to create an exception to the intentional-tort exception of 28 U.S.C. § 2860(h).

fore barred by 28 U.S.C. § 2680(h) which, prior to 1974, flatly excepted from FTCA "[a] ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

[4] Then pending before the Senate Government Operations Committee, H.R. 8245 concerned the reorganization of various drug law enforcement agencies.

IV.

In waiving sovereign immunity with regard to intentional torts committed by federal investigative or law enforcement officers, Congress did not enact a discrete statutory provision; rather, it used as its vehicle the Federal Tort Claims Act, 28 U.S.C. § § 1346(b), 2671 *et seq.* Section 2674, which waves the sovereign immunity of the United States and thus renders it liable for the torts described in the Act, states that the United States "shall be liable . . . *in the same manner and to the same extent as a private individual under like circumstances . . .*" (Emphasis added). Section 1346(b), the basic jurisdictional grant of FTCA, vests exclusive jurisdiction in United States district courts over suits involving

> claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, *under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.* (Emphasis added.)

As evidenced by the clear language of these provisions as well as by subsequent case law, Congress did not intend to create substantive federal law in enacting FTCA; it limited the liability of the United States to vicarious liability for the acts or omissions of its employees which, in turn, were tortious under the law of the place where the acts or omissions occurred. Both the precipitating tort and the scope of the government's vicarious liability were to be governed by "the law of the [state] where

the act or omission occurred." *See* Laird v. Nelms, 406 U.S. 797, 801 (1972); Richards v. United States, 369 U.S. 1, 6-7 (1962).

It is therefore incongruous that Congress utilized FTCA as the means of waiving sovereign immunity in the *Bivens* context. *Bivens* created a *federal* tort, and the scope of governmental liability under the 1974 amendment presents essentially a question of federal law.[5] Instead of looking to a particular state's doctrine of *respondeat superior,* as we would in the typical FTCA case,[6] we must seek to determine the scope of liability intended by Congress in enacting the 1974 proviso to § 2680(h).[7]

---

[5] *Cf.* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, *supra,* 403 U.S. at 409 (Harlan, J., concurring). In finding a federal damages remedy directly under the fourth amendment to be an appropriate exercise of judicial power, Mr. Justice Harlan cites as one reason the need for fourth amendment violations to "be compensable according to uniform rules of federal law." Clearly a necessary component to such uniformity is a federal rule as to the scope of the government's vicarious liability under FTCA. Therefore, we find it inappropriate, as the government would have us do, to rely upon traditional state-law doctrines of *respondeat superior.* See n.8 *infra.*

[6] *See, e.g.,* Williams v. United States, 350 U.S. 857 (1955), *vacating,* 215 F.2d 800 (9 Cir. 1954); James v. United States, 467 F.2d 832 (4 Cir. 1972); Yates v. United States, 365 F.2d 663 (4 Cir. 1966); Jennings v. United States, 291 F.2d 880 (4 Cir. 1961).

[7] We view this case solely as one of statutory interpretation. While we recognize the force of the district court's policy arguments in favor of expanded liability, 427 F.S. at 150-52, they are largely irrelevant to our decision. If we were writing on a clean slate, the policy arguments of both parties would receive our carefull attention; however, where Congress has spoken, as it has here by means of the 1974 amendment to § 2680(h), we must be guided not by our own policy judgments but by those of Congress.

The plain language of the amendment offers no clue as to congressional intent with regard to the scope of the government's liability. Indeed, reading only the amendment itself, one might even question its applicability to the federal tort created by *Bivens*. The statutory language, as well as the placement of the waiver within the confines of FTCA,[8] suggests that its applicability is limited to suits alleging certain state-created intentional torts committed by federal law enforcement officers. The legislative history, however, makes clear that the 1974 amendment was viewed by Congress as "a counterpart to the *Bivens* case. . . ." S. Rep. No. 93-588, *supra*, [1974] U.S. Code Cong. & Ad. News at 2791.

[8]The government has argued both in the court below and before us that the preexisting structure of FTCA and the case law arising thereunder support its view that the government is entitled to assert the defenses of its agents to defeat plaintiff's claim. Specifically, the government has argued (1) that § 1346(b) makes the government liable only for tortious conduct and that in the *Bivens* context no tortious conduct occurs unless the constitutional violation is committed either in bad faith or with an unreasonable belief; (2) that the imposition of liability without regard to the individual motives or beliefs is tantamount to the imposition of absolute liability, which would contravene two Supreme Court decisions holding that the FTCA will not support "the imposition of strict liability of any sort upon the Government," Laird v. Nelms, *supra*, 406 U.S. at 803; *see also* Dalehite v. United States, 346 U.S. 15 (1953); and (3) that the defenses of good faith and reasonable belief constitute a privilege rather than an immunity and that under general *respondeat superior* doctrine a principal has a defense if his agent had a privilege which he properly exercised in his principal's behalf. Restatement (2d), Agency, §217(a)(iii)(1958). While each of these arguments supports the result we reach, we do not ground our decision on these rationale. Despite the amendment's placement in FTCA, we are convinced that the waiver of sovereign immunity to *Bivens*-type liability is *sui generis* and therefore the structure of FTCA, prior cases construing other provisions of FTCA or general principles of *responeat superior* in interpreting the 1974 amendment, singly or in combination, does not answer the question before us.

While the legislative history makes clear that the federal government may be sued for *Bivens* torts committed by its agents, the history is not as clear with regard to the intended scope of the government's vicarious liability.[9] It was the district court's view that on balance the legislative history disclosed an intent to impose liability on the government for fourth amendment violations irrespective of any individual defenses that might be asserted. We think not.

Senate Report No. 93-588, which accompanied the amendment to §2680(h), states that the amendment "should be viewed as a counterpart to the *Bivens* case and its progenty [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages *for the same type of conduct that is alleged to have occurred in Bivens (and for which that case imposes liability upon the individual Government officials involved).*" S. Rep. No. 93-588, *supra*, [1974] U.S. Code Cong. & Ad. News at 2791 (emphasis added). We think that this explanation of purpose strongly suggests an intent to allow vicarious liability only in those cases where individual liability would lie under *Bivens*. The district court concluded, however, that this expression of purpose was outweighed by other evidence in the legislative history indicating a more expansive view of governmental laibility.

First, the district court concluded that the overall tenor of the Senate Report reflects a concern with providing an effective remedy to individuals whose fourth

[9]For a detailed account of the legislative history surrounding enactment of the amendment, *see* J. Boger, M. Gitenstein, P. Verkuil, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis, 54 N.C.L. Rev. 497, 505-17 (1976); *see also* Norton v. Turner, *supra*, 427 F.S. at 148 n.11.

amendment rights have been violated. As we read that report, however, we think that it shows a concern with providing an effective remedy "for innocent victims of Federal law enforcement *abuses.*" S. Rep. 93-588, *supra,* [1974] U.S. Code Cong. & Ad. News at 2792 (emphasis added). It must be remembered that Congress passed this legislation in the wake of the Collinsville drug raids where government officials had engaged in what may fairly be described as outrageous behavior.[10] As the report stresses, it is the *type* of conduct alleged both in *Bivens* and by the victims of the Collinsville raids—intentional and abusive conduct on the part of law enforcement officers—about which Congress was concerned. It was, we think, to remedy these more egregious wrongs that Congress waived sovereign immunity.

Second, the district court thought that other documents in the legislative history—specifically Senator Percy's remarks quoted earlier and a memorandum prepared by the staff of the Senate Government Operations Committee—provide direct support for the conclusion that Congress intended to impose vicarious liability without regard to individual defenses. While we recognize that both of these documents support this conclusion, we do not think that they are entitled to the weight accorded them by the district court.[11] What must guide us is not

[10] For a vivid description of the Collinsville raids, *see* J. Boger, *et al.* The Federal Tort Claims Act Intentional Torts Amendment, *supra,* 54 N.C.L. Rev. at 500-02 (1976).

[11] In the Boger, Gitenstein and Verkuil article, supra n.9, it is suggested that the staff memorandum is conclusive as to congressional intent:

> On one point, however, the Senate committees were clearly insistent on distinguishing their recommend-

[footnote continued]

Senator Percy's intent nor the intent of the committee staff, but rather the intent of Congress. We therefore give most weight to Senate Report No. 93-588, which represents the explanatory remarks of the committee. The Senate Report itself contains none of the clear language found in Senator Percy's remarks or in the staff memorandum. To the contrary, a fair reading of the Report supports the government's position that the remedy against the government under FTCA is inextricably tied to the remedy against the individual officer under *Bivens.*[12]

> ation from prior law. The federal govenment was not to be allowed to escape liability under the new statute by retreating behind various "defenses" that had been created under *Bivens* or section 1983. . . . Thus, despite the constant reference in legislative documents to *Bivens* and section 1983, the proposed federal liability was meant to differ in this very crucial aspect form its historical analogues.

54 N.C.L. Rev. at 515.

The fact is that the memorandum was not made part of the legislative record; it was not referred to, nor mentioned at any point during the legislative consideration of the 1974 amendment. Indeed, we call attention to footnote 15 of the district court's opinion, 427 F.S. at 150, where the court acknowledges that it was unable to secure a copy of this memorandum in the legislative documents available. Instead the court was forced to rely upon the Boger, Gitenstein and Verkuil article both for proof of the existence of the memorandum and for its contents. If, as the article's authors say, the committee was "clearly insistent" on the point and if this is what the committee clearly "meant," the committee's failure to note this departure from *Bivens* clearly in its report is totally inexplainable.

[12] The district court also placed weight on other language in the report suggesting an intent to impose liability when federal agents act in "bad faith or without probable cause" or when searches are conducted "without warrants or with warrants issued without probable cause." 427 F.S. at 149. To the extent that either of these phrases support an expansive view of governmental liability, we discount them as attributable to imprecise draftsmanship.

V.

The decision we reach is also supported by the well-established principle of statutory interpretation that "statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." McMahon v. United States, 342 U.S. 25, 27 (1951). While we are mindful of Mr. Justice Frankfurter's admonition not to view ourselves as a "self-constituted guardian of the Treasury [importing] immunity back into a statute designed to limit it," Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955), there can be little question but that imposition of liability without regard to the individual officer's defenses of good faith and reasonable belief would be a substantial enough departure from general principles of *respondeat superior*[13] and would impose a potentially burdensome enough impact on the federal treasury that it should be supported by a clear expression of legislative intent in either the statute itself or in the accompanying legislative history. *Cf.* Laird v. Nelms, *supra*, 406 U.S. at 802; Feres v. United States, 340 U.S. 135, 146 (1950). Because we find no clear statement of a legislative policy to expand the government's vicarious liability beyond the scope of its agents' direct liability, this rule of construction requires that we reverse the decision of the district court and remand this case in order to allow the government to produce evidence of its agent's good faith and reasonable belief in the legality of their conduct.[14]

[13] As the district court itself noted, employers are generally entitled under traditional principles of *respondeat superior* to assert all defenses available to their employees. Restatement (2d), Agency, §219 Comment c (1958); Norton v. Turner, *supra*, 427 F.S. at 147.

[14] For an interesting proposal that would achieve legislatively the result reached by the court below, *see* J. Newman, suing the [footnote continued]

REVERSED AND REMANDED.

BUTZNER, Circuit Judge, dissenting:

I dissent primarily for the reasons states in the opinion of the district court, Norton v. Turner, 427 F.Supp. 138 (E.D. Va. 1977), which, in my view, correctly analyzes the legislative history and the scope of the 1974 amendment to the Federal Tort Claims Act, 28 U.S.C. §2680 (h). Consequently, I write briefly only to emphasize the incongruity of allowing the government to escape liability on the basis of the personal immunity of its officers.

The Supreme Court has treated the good faith defense of executive officials, including law enforcement officers, as a qualified immunity. *See* Wood v. Strickland, 420 U.S. 308, 313-22 (1975); Scheuer v. Rhodes, 416 U.S. 232, 238-249 (1974); Pierson v. Ray, 386 U.S. 547, 555-57 (1967).[1] Immunity is conferred because of the

Lawbreakers: Proposals to strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L. J. 447 (1978). Judge Newman propsoes that 42 U.S.C. §1983 be amended to impose vecarious liability on every employing department of government—federal, state or local—for the constitutional torts of its employees. "[T]he imposition of liability upon the wrongdoer's employer would make it entirely appropriate to eliminate . . ." those defenses available to the wrongdoer himself. *Id.* at 459.

[1] Other authorities refer to police officers' pleas of good faith and reasonable belief in the legality of their conduct as a simple defense or as a privilege. *See, e.g.*, Bivens v. Six Unknown Named Agents, etc., 456 F.2d 1339 (2nd Cir. 1972) (defense); Restatement (Second) of Torts §§10, 121(b) (privilege). *See generally*, Norton v. Turner, 427 F.Supp. 138, 147 n.9 (E.D. Va. 1977). Under these theories officers are considered to have done no wrong. Pressing for the acceptance of this nomenclature the government contends that it is not vicariously liable.

Of course, I prefer to follow the Supreme Court's analysis which recognizes that the defense is a true immunity. That is to say, even [footnote continued]

status of the official, but it does not diminish the tort. W. Prosser, The Law of Torts, ch. 26 at 970 (4th ed. 1971). The Chief Justice succinctly explained these concepts in Scheuer v. Rhodes, *supra,* 416 U.S. at 241-42:

> Public officials, whether governors, mayors or *police,* legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all. [emphasis added]

The government never previously relied on the immunity of its officers as a defense. It asserted its own sovereign immunity. But the 1974 amendment to the Act unequivocally waived sovereign immunity for specified torts committed by law enforcement officers. The Act does not condition the waiver of sovereign immunity on the absence of the officers' personal immunity. No principle of common law, no statute or decisional precedent, either federal or state, authorizes the government to substitute its officers' personal immunity for the sovereign immunity which an Act of Congress waives.

Indeed, the common law ordinarily does not permit an employer to escape liability because his employee is personally immune. The rule is stated as follows in Restatement (Second) of Agency § 217(b) (ii) (1958):

> (b) The principal has no defense because of the fact that:
>
> (ii) the agent had an immunity from civil liability as to the act.

The acceptance of this principle in Virginia, where the illegal search occurred, is illustrated by Worrell v. Worrell, 174 Va. 11, 25, 4 S.E.2d 343, 348 (1939).[2]

There is a fundamental difference between the qualified immunity granted a public official and sovereign immunity. A public official is afforded protection from personal liability because the public interest requires that he be free to discharge his duties in good faith without fear of being impoverished if he errs. *See* Scheuer v. Rhodes, *supra,* 416 U.S. at 241-42. On the other hand, sovereign immunity is based on the recognition "that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821). The basic flaw in the government's position is the premise that these distinctive immunities are interchangeable. They are not. By amending the Act in 1974, Congress preserved the qualified immunity of federal law enforcement officers; at the same time, it allocated to the public at large the risk of a mistake, instead of visiting the cost solely on the innocent victim of the error.

---

though the officer has erred, the public interest in assuring the discharge of his duties grants him a qualified or absolute immunity as the case may be. Of the three theories—simple defense, privilege, and immunity—the most realistic concept is immunity. *See* Stump v. Sparkman, 98 S.Ct. 1099 (1978) (absolute immunity); Scheuer v. Rhodes, 416 U.S. 232 (1974) (qualified immunity).

[2] In *Worrell,* the court cited with approval cases from other states permitting recovery against employers of family members based on the members' negligence as employees even though intra-family immunities protected the employees from liability to their families.

Because the judgment of the district court conformed unexceptionably to the 1974 amendment and the congressional intent that prompted this reform, I respectfully dissent.

[Filed Aug. 18, 1976]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1919

Elizabeth Ann Norton,	Appellee,
versus	
United States of America,	Appellant.
and	
John Turner, Robert O'Brien,	Defendants.

ORDER

Upon consideration of the appellee's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Rehearing is denied on the concurrence of Judge Widener and Judge Winter. Judge Butzner dissents from the denial of the rehearing.

FOR THE COURT,
/s/ William K. Slate, II
CLERK